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Supreme Court of the United States

October Term, 1955

No. .....

DAVID RINES, individually and as administrator of Estate of Lucy L. Rines, Petitioner to Establish the Truth of Exceptions, APPELLANT.

APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

The appellant, David Rines, individually and as administrator of the estate of his wife, Lucy L. Rines, submits herewith this Jurisdictional Statement, to show that the Supreme Court of the United States has jurisdiction of this appeal, and that substantial federal questions are presented.

OPINION BELOW

This is an appeal from the final rescript or judgment of the Full Court of the Supreme Judicial Court of the Commonwealth of Massachusetts, dismissing a Petition to Establish the Truth of Exceptions, numbered, on the docket of the said Supreme Judicial Court, No. 11,399. The order of dismissal, which is unreported, reads as follows:

> After hearing, the court orders that the petition be, and the same is, hereby dismissed for the reason that

the bill of exceptions establishment of which is sought, to wit, plaintiff's so called amended second substitute consolidated bill of exceptions, does not appear to be either an original bill of exceptions or an original bill of exceptions as amended in accordance with any order of the judge. *Graustein, petitioner,* 304 Mass. 679. *Hector* v. *Boston Electric Light Co.,* 161 Mass. 558, 560-561. *Ryder* v. *Jenkins,* 163 Mass. 536, 538. See *Thorndike, petitioner,* 257 Mass. 409; *Barnard Manufacturing Co.* v. *Eugen C. Andrews Co.,* 234 Mass. 148.

The said Petition to Establish the Truth of Exceptions, No. 11,399, is one of a number of companion Petitions to Establish the Truth of Exceptions, several of which are more fully described on pages 2 and 3 of the Jurisdictional Statement in No. 694, October Term, 1954, appeals dismissed for the want of a substantial federal question, May 23, 1955. The appellant has filed a Petition for Rehearing in the said No. 694.

JURISDICTION

The said rescript or judgment of the Supreme Judicial Court was dated and entered March 22, 1954. A petition for rehearing was denied, without opinion, on February 1, 1955. A Notice of Appeal was filed May 2, 1955.

The jurisdiction of the Supreme Court of the United States to review the dismissal by the Supreme Judicial Court by direct appeal is conferred by 28 U.S.C., Section 1257(2).

Some of the grounds upon which this appeal is based, if taken alone, would have been more appropriately considered under 28 U.S.C., Section 1257(3). They are proper to be included, however, under the decision of this Court in *Flournoy* v. *Wiener,* 321 U.S. 253, 263. A separate petition for certiorari would appear to be unnecessary in view of 28 U.S.C., Section 2103.

The following decisions sustain the jurisdiction of the Supreme Court to review the rescript or judgment on direct appeal in this case:

With respect to the repugnancy of a state statute, as applied, to the Constitution of the United States: *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U.S. 282, 290, *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 86, *Illinois ex rel. McCollum* v. *Board of Education of School District No. 71, Champaign County, Illinois*, 333 U.S. 203, 206.

A dismissal of a Petition to Establish the Truth of Exceptions constitutes a termination of the litigation both in the Supreme Judicial Court and also the Superior Court. With respect to the finality of the litigation, therefore "there is nothing more to be decided". *Pope* v. *Atlantic Coast Line Railroad Co.*, 345 U.S. 379, 382.

There were no federal questions involved with respect to the Petition to Establish the Truth of Exceptions, No. 11,399, until the said order of dismissal, dated March 22, 1954, itself raised them. The attention of the Supreme Judicial Court was thereupon invited to these federal questions in the said petition for rehearing. The Chief Justice has signed a Certificate, from which the following is quoted:

> Under our practice petitions for rehearing after decisions by this Court are not a recognized part of the proceedings in a case. They are not filed with the clerk and are never in his possession. But as it is always possible for a court to make a mistake or to be led astray by some misapprehension we are willing and anxious that anything of this kind should be brought to our attention and corrected if possible. To this end the Chief Justice will receive a letter addressed to him personally stating the supposed mistake and asking that it be corrected or for a rehearing. This letter

is usually short and informal. Applications for rehearing are regarded as matters of grace and not as of right. Argument upon them is not permitted • • • In the cases to which this certificate relates, instead of sending a letter to the Chief Justice in the ordinary way, Mr. Rines presented to the Chief Justice or transmitted to him the formal petition and papers annexed thereto copies of which are hereto attached. These were examined by all the Justices who took part in the original decisions and the following order was rendered upon the petition for rehearing:

"February 1, 1955.

Denied.

STANLEY E. QUA,
Chief Justice".

Since "all the Justices who took part in the original decisions", in their willingness and anxiety not "to make a mistake or to be led astray by some misapprehension • • • • examined" the petition for rehearing, it is to be concluded that they all entertained the petition for rehearing, and decided against the appellant's contention that he had been deprived of any of his rights under the Fourteenth Amendment to the Constitution of the United States. Under these circumstances, it is believed that *Lisenba* v. *California*, 314 U.S. 219, 222, and not *Consolidated Turnpike Company* v. *Norfolk & Ocean View Railway Company*, 228 U. S. 326, 333-334, controls. In any event, since the petition for rehearing provided the appellant with the very first opportunity to invite the attention of the Full Court to the constitutional questions that its own said order of March 22, 1954, raised, this appeal is governed by *Saunders* v. *Shaw*, 244 U. S. 317, 320 and *Herndon* v. *Georgia*, 295 U. S. 441, 444 (see also Mr. Justice Cardozo's dissenting opinion, page 447). The refusal of a state court to decide a constitutional question, furthermore, has the same effect as a definite holding against the claim of unconstitutionality,

Lawrence v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282.

It may be also that the following decision is as applicable in connection with the Questions Presented under the new rules of this Court as in connection with the assignments of error under the old: *Johnson* v. *New York Life Insurance Company*, 187 U. S. 491, 495.

Further decisions bearing on jurisdiction will be cited hereinafter.

THE STATUTES INVOLVED

This appeal involves the validity, as applied in this case, of two statutes of the Commonwealth of Massachusetts, chapter 231, sections 113 and 117, of the General Laws, Tercentenary Edition, referred to herein as the first and second statutes, respectively. These are reproduced in Appendix A.

The first statute, section 113, provides that: first, exceptions to rulings of a judge of the Superior Court, in any civil cause tried by a jury, shall be reduced to writing in a summary manner; secondly, the excepting party may be allowed to make such amendments to his bill of exceptions as will make it a more accurate statement of the exceptions originally filed by him; and, thirdly, if the presiding judge finds that the exceptions, with any amendments thereof thus allowed, are conformable to the truth, he shall allow them.

The second statute, section 117, provides that, if the judge of the Superior Court disallows or fails to sign and return the exceptions, the excepting party may thereupon file, before the Full Court of the Supreme Judicial Court, a Petition to Establish the Truth of the Exceptions.

QUESTIONS PRESENTED

1. Whether the said two statutes, chapter 231, sections 113 and 117, as applied, are valid, or, on the contrary, are repugnant to the Fourteenth Amendment to the Constitution of the United States.

2. Whether, consistent with the Fourteenth Amendment the said two statutes, chapter 231, sections 113 and 117, may be so applied as: first, to authorize the issuance of an order requiring the appellant to file an "Amended Second Substitute Consolidated Bill of Exceptions" that shall not conform to the truth, without affording the appellant, either in the Superior Court or the Supreme Judicial Court, a hearing, at which to offer evidence as to such non-conformity with the truth; and, secondly, without hearing, to dismiss the appellant out of court as punishment for refusing to obey such order to amend into non-conformity with the truth.

THE STATEMENT OF THE CASE, INCLUDING THE MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED.

Introduction

Petitions to Establish the Truth of Exceptions and the procedure relating thereto are described on pages 8-13 of the Jurisdictional Statement in the before-mentioned case, No. 694, October Term, 1954. As stated on page 10 of that Jurisdictional Statement, such petitions, under the said two statutes, sections 113 and 117, as applied, are dismissed by the Full Court of the Supreme Judicial Court summarily, without opportunity to present evidence, and without

effective hearing, except in the rare instances when the petitioners are referred by the Full Court to a Commissioner.

As appears from page 7 of that Jurisdictional Statement, the appellant, both individually and as administrator of the estate of his wife, Lucy L. Rines, is the plaintiff in sixteen actions at law in the Superior Court of the Commonwealth of Massachusetts. These sixteen actions at law were consolidated for trial, and as so consolidated, were tried to a jury. The trial terminated in directed verdicts for the defendants. In several instances, the verdicts were directed after the jury had found for the plaintiff. In other instances, the judge did not permit the cases even to get as far as the jury. A complete account of the proceedings is given in the appellant's verified Petition for a Writ of Mandamus, referred to at the bottom of page 1 and the top of page 2 of the "Reply Brief on Behalf of the Appellant", in the before-mentioned case, No. 694, October Term, 1954.

The appellant saved exceptions, and filed successively four bills of exceptions. These are described, on pages 15-16 of the before-mentioned Jurisdictional Statement, No. 694, October Term, 1954, as an original bill of exceptions, a first "Substitute Consolidated Bill of Exceptions", a "Second Substitute Consolidated Bill of Exceptions" and an "Amended Second Substitute Consolidated Bill of Exceptions". It is further there stated that the appellant abandoned his first "Substitute Consolidated Bill of Exceptions", and that the two appeals in the said No. 694, October Term, 1954, are concerned with the original bill of exceptions and the "Second Substitute Consolidated Bill of Exceptions".

The present appeal, on the other hand, is concerned with the "Amended Second Substitute Consolidated Bill of Exceptions".

As is related on pages 17-18 of the Jurisdictional Statement, No. 694, October Term, 1954, the "Amended Second Substitute Consolidated Bill of Exceptions" was filed under the following circumstances:

On July 2, 1953, after a so-called hearing, on June 29, 1953 (at which the appellant was denied the privilege of offering evidence), the judge of the Superior Court issued a written order requiring the appellant to amend the "Second Substitute Consolidated Bill of Exceptions" by incorporating therein a number of changes demanded by opposing counsel, some of which did and others of which did not conform to the truth. Insofar as the said order of July 2, 1953, required changes not in conformity with the truth, of course, it was illegal and void, but the judge of the Superior Court refused to hear the appellant as to that (or any other) matter. The appellant complied with the said written order of July 2, 1953, insofar as it was possible to do so within the limits of truth. The "Amended Second Substitute Consolidated Bill of Exceptions" contains all the demanded changes except those not conformable to the truth.

The Judge of the Superior Court held a so-called hearing on the "Amended Second Substitute Consolidated Bill of Exceptions" on December 22, 1953. The appellant would quote as follows, from pages 8 and 10 of the affidavit of the appellant's attorney, Lester W. Cooch, accompanying the petition for rehearing (there was no other way to impart this information to the Supreme Judicial Court, in the absence of a hearing, at which to present evidence):

Together with this "Amended Second Substitute Consolidated Bill of Exceptions", I filed also a Memorandum, stating that it complied, in every particular, with the said order of July 2, 1953, except insofar as complete compliance would have resulted in violation of the truth. The said Memorandum also stated which of the ordered items had not been incorporated in the "Amended Second Substitute Consolidated Bill of Exceptions", explaining why the items so not incorporated were not in conformity with the truth. * * * *

The said Memorandum that I filed with the "Amended Second Substitute Consolidated Bill of Exceptions" concluded:

> The plaintiff has made a bona fide effort to comply with the order of the court, and prays for a further order in the event that he should be held inadvertently to have failed to do so, in any particular.

I also read that sentence, verbatim, in open Court, at the said hearing, on December 22, 1953, and requested the said judge to make a ruling as to whether his said order of July 2, 1953 had or had not inadvertently required to be incorporated into the said "Amended Second Substitute Consolidated Bill of Exceptions" changes that did not conform to the truth. I did not, therefore, defy the said judge of the Superior Court. I merely requested that the said judge of the Superior Court re-consider its order with respect to those few items that do not conform to the truth, and I also requested a ruling as to whether the "Amended Second Substitute Consolidated Bill of Exceptions" does or does not comply with the said order of July 2, 1953, insofar as the items contained in the said order conform to the truth. These requests, however, have been ignored.

So ignoring these requests, the judge of the Superior Court entered an order denying a motion by the appellant to allow this "Amended Second Substitute Consolidated Bill of Exceptions".

This order, under the ruling of the Supreme Judicial Court, in *Rings, Petitioner*, Advance Sheets, 1954, page

819, reproduced as Appendix A, commencing with page 31 of the Jurisdictional Statement, No. 694, October Term, 1954, at page 33, constituted a disallowance of this "Amended Second Substitute Consolidated Bill of Exceptions", because it

> * * * represented the action which he intended to take as a result of that hearing, and that this action was not an allowance of that bill of exceptions. It was a disallowance * * *

The appellant accordingly filed his Petition to Establish the Truth of Exceptions, No. 11,399, involved on the present appeal. There is no dispute but that he filed it seasonably, within the twenty days provided for by Rule 22 of the Rules for the Regulation of Practice Before the Full Court.

The Supreme Judicial Court, however, summarily dismissed the Petition to Establish the Truth of Exceptions, No. 11,399.

This dismissal, under the practice outlined on page 10 of the Jurisdictional Statement, No. 694, October Term, 1954, was without permitting the appellant to present evidence, or to be heard, before a Commissioner.

The Dismissal of the Petition to Establish the Truth of Exceptions, No. 11,399, Was in Violation of the Fourteenth Amendment to the Constitution of the United States.

The reason assigned by the Supreme Judicial Court for the dismissal of the Petition to Establish the Truth of Exceptions, No. 11,399, as quoted on page 2, *supra*, is that the "Amended Second Substitute Consolidated Bill of Exceptions" was not "amended in accordance with any order of the judge"; that is, it did not contain those of the changes illegally demanded by the order of the judge

of the Superior Court, dated July 2, 1953, that were not in conformity with the truth.

The Supreme Judicial Court has so applied the said two statutes, sections 113 and 117, therefore, as:

First, to authorize the judge of the Superior Court illegally to issue an order requiring the appellant to amend a bill of exceptions into non-conformity with the truth, under penalty of driving the appellant out of court altogether, for refusal to do so; and,

Secondly, to deny the appellant a hearing, both in the Superior Court and the Supreme Judicial Court, at which to offer evidence that, in order to comply with this illegal order of the judge of the Superior Court, it would be necessary to violate the truth.

The appellant has not, furthermore, either in the Superior Court or the Supreme Judicial Court, obtained the "basic requirement of due process", namely the fair hearing, referred to by this Court in the *Matters of Lee Roy Murchison and John White, Petitioners,* No. 405, October Term, 1954, May 16, 1955.

As applied by the Supreme Judicial Court, therefore, the said two statutes, sections 113 and 117, as demonstrated on pages 20-22 of the Jurisdictional Statement, No. 694, October Term, 1954, have deprived the appellant, both in the Superior Court and the Supreme Judicial Court, contrary to due process, of a hearing, at which to present evidence; he has been denied the equal protection of the laws; and his privileges and immunities, as a citizen of the United States, have been abridged.

The Grounds Advanced in "Appellees' Motion to Dismiss Appeals and Brief in Support Thereof", in No. 694, October Term, 1954, Are Not Tenable on the Present Appeal.

The following four grounds were relied upon, on page 3 of "Appellees' Motion To Dismiss Appeals", in No. 694, October Term, 1954:

I. That the appeals present no substantial federal question.

II. That no federal question sought to be reviewed was timely or properly raised.

III. That no federal question sought to be reviewed was expressly passed on by the State Court.

IV. That the judgment of the State Court rests upon an adequate non-federal basis.

I. Substantial Federal Questions Are Presented On The Present Appeal

The basis for the first ground, as stated on page 4, is that

> It is, however, well settled that a right to such [appellate] review is not a necessary element of due process.

It is equally well settled, however, as appears from the discussion on pages 5-8 of the "Reply Brief in Behalf of the Appellant", No. 694, October Term, 1954, and as stated in the dissenting opinion, *National Union of Marine Cooks and Stewards* v. *Arnold*, 348 U. S. 37, that where a state does

> provide a system of appellate court review • • • proceedings in its supreme court are merely the final step in the judicial process in trying cases and therefore cannot be conducted so as to deny that "due process" which the Fourteenth Amendment requires. *Cole* v. *Arkansas*, 333 U. S. 196, 201-202, and cases there cited.

The majority opinion did not disagree with this statement in the dissenting opinion. The only point of disagreement was that

> The dismissal here is not regarded by us as a penalty imposed as a punishment for criminal contempt.

In the present case, on the other hand, the dismissal by the Supreme Judicial Court *was* as a punishment for the refusal of the appellant to obey an illegal order of the judge of the Superior Court.

As the majority opinion reads further, though the right to "review is not a requirement of due process", nevertheless,

> • • • a statutory review is important and must be exercised without discrimination • • •

There is also another point of difference. The majority opinion reads also:

> Furthermore, the appeal was not summarily dismissed. Petitioner was allowed 15 days, after being adjudged in contempt, within which to purge itself.

In the present instance, on the other hand, as appears from page 9, *supra*,

> I did not, therefore, defy the said judge of the Superior Court. I merely requested that the said judge of the Superior Court reconsider its order with respect to those few items that do not conform to the truth, and I also requested a ruling as to whether the "Amended Second Substitute Consolidated Bill of Exceptions" does or does not comply with the said order of July 2, 1953, insofar as the items contained in the said order conform to the truth. These requests, however, have been ignored.

II. The Manner in Which the Federal Questions Were Raised

As related on page 3, *supra*, there were no federal questions involved, until they were raised by the Supreme Judicial Court itself, by its said order of March 22, 1954, dismissing the Petition to Establish the Truth of Exceptions, No. 11,399. That order, therefore, was a complete surprise. The appellant could not have expected the Supreme Judicial Court to dismiss the Petition To Establish the Truth of Exceptions, No. 11,399, contrary to his rights under the Fourteenth Amendment, and particularly without affording the appellant an opportunity to present evidence, or to be heard.

The very first opportunity that was afforded the appellant to invite the attention of the Supreme Judicial Court to these constitutional questions, therefore, was in the petition for rehearing.

This petition for rehearing, however, as before stated, page 4, was denied, without opinion.

Attention is invited to the authorities on page 4, *supra*.

III. The Federal Questions Sought To Be Reviewed Were Expressly Passed Upon By The State Court.

Attention is invited to page 4, *supra*.

IV. The Judgment Of The State Court Does Not, in this Case, Rest Upon A Non-Federal Basis

The argument, on page 8 of "Appellees' Motion to Dismiss and Brief In Support Thereof", No. 694, October Term, 1954, was based upon Rule 22 of the Rules for the Regulation of Practice Before the Full Court.

No violation of that Rule 22, however, is even alleged in connection with the Petition To Establish The Truth of Exceptions, No. 11,399, involved on this appeal, because it was filed within the twenty days provided for by that Rule 22.

There has never been any criticism, furthermore, to the effect that the "Amended Second Substitute Consolidated Bill of Exceptions" does not comply with the requirement of the first statute, section 113, that exceptions "shall be reduced to writing in a summary manner".

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

Attention is invited to the discussion of this topic on pages 27 to 30 of the Jurisdictional Statement, No. 694, October Term, 1954.

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal, and that substantial federal questions are presented.

Respectfully submitted,

DAVID RINES,
ROBERT H. RINES,
No. Ten Post Office Square,
Boston 9, Massachusetts.
Counsel for the Appellant.

RINES AND RINES,
No. Ten Post Office Square,
Boston 9, Massachusetts.
Of Counsel.

APPENDIX A

STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, GENERAL LAWS, TERCENTENARY EDITION

Chapter 231, section 113, as amended by St. 1945, c. 328, Vol. II, page 2876

"Exceptions may be alleged by any party aggrieved by an opinion, ruling, direction or judgment of the supreme judicial court, of the superior court, or of the land court, rendered upon any matter of law in any civil cause, according to the course of the common law or otherwise, tried by a jury or heard by the court, or upon a motion for a new trial. The exceptions shall be reduced to writing in a summary manner and filed with the clerk, and notice thereof shall be given to the adverse party, in civil cases tried by a jury, within twenty days after the verdict is rendered, and in cases tried without a jury, within twenty days after the notice of the decision has been received, unless further time is allowed by the court. The presiding justice shall thereafter, upon their presentation to him by any party to the action, examine the exceptions, and after hearing the parties, determine whether they are conformable to the truth. The excepting party may be allowed to make such amendments to his bill of exceptions as will make it a more accurate statement of the exceptions originally filed by him. If the presiding justice finds that the exceptions, with any amendments thereof thus allowed, are conformable to the truth, he shall allow them. The presiding justice may, if, in his opinion, a bill of exceptions is filed in good faith, and justice so requires, allow such bill of exceptions, although the excepting party or his attorney failed, through inadvertence, to comply with all of the provisions of this section. If, through inadvertence, a party who has duly claimed exceptions failed to file a bill of exceptions within said twenty days or within such further time as may have been allowed, the presiding justice may, before final judg-

ment, upon motion after notice and hearing, allow a bill of exceptions to be filed and may allow such bill of exceptions."

Chapter 231, section 117, Vol. II, page 2878

"If the presiding justice, or another justice acting under section one hundred and fifteen, disallows or fails to sign and return the exceptions or alters any statement therein, and either party is aggrieved thereby, the truth of the exceptions presented may be established before the full court upon petition stating the grievance, and thereupon, the truth of the exceptions being established, they shall be heard, and the same proceedings taken, as if the exceptions had been duly allowed and entered. The supreme judicial court shall make rules for settling the truth of exceptions alleged and not allowed."